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National Highway Traffic Safety Administration
Docket Management
Room PL-401
400 Seventh Street, SW
Washington, DC 20590

Re: Docket No. NHTSA 2001-8677; Notice 1 – 31

I am transmitting enclosed two copies of Volkswagen Group's comments regarding the Advance Notice of Proposed Rule Making issued on January 22, 2001.

Sincerely,

Joseph Kennebeck

Joseph Kennebeck

Enclosures

VW COMMENTS TO TREAD ANPRM

Docket # NHTSA 2001-8677; Notice 1

Volkswagen AG, Audi AG, and Volkswagen of America, Inc. (collectively "Volkswagen Group," "Volkswagen," or "VW") respectfully submit these comments regarding the ANPRM issued on January 22, 2001 (66 Fed. Reg. 6532).

1. The Volkswagen Group is the largest European automobile manufacturer It markets and distributes motor vehicles worldwide under numerous brand names, including Volkswagen, Audi, SEAT, Skoda, Rolls Royce, Bentley, Lamborghini, and Scania. The Volkswagen Group maintains manufacturing facilities in numerous countries and exports motor vehicles and motor vehicle parts through affiliates or independently owned importers into approximately 160 countries worldwide. VW Group products are imported into the United States by Volkswagen of America, Inc. (VWoA), Rolls Royce and Bentley Motorcars, Inc. and Lamborghini S.p.A. VW brand products imported into the United States originate in Germany, Brazil, and Mexico. Audi brand products imported into the United States originate in Germany and Hungary. Rolls Royce and Bentley brand products are manufactured in the United Kingdom. Lamborghini brand products are manufactured in Italy.

2. The Volkswagen Group has always been a leader in automobile safety. For example, Volkswagen was a leader in introducing passive restraints, safety cell technology, and

active safety features aimed at preventing crashes (e.g., negative steering roll radius and track correcting rear axles).

3. Since VW products are sold in over 160 countries, problems of enormous difficulty would ensue if NHTSA's final rule were to embrace an unreasonably expansive scheme of periodic data reporting.

4. The TREAD Act specifically provides for information to be reported to NHTSA "periodically *or upon request*" (*see* 49 U.S.C. 30166(m)(3)(A), (B)) (emphasis added). Accordingly, NHTSA retains broad discretion to limit the streams of information that would otherwise be provided en masse on a routine basis.

5. The Act also specifically provides for a restrictive approach to disclosure (*see* 49 U.S.C. 30166(m)(4)(C)) and provides that any requirements adopted by NHTSA not be "unduly burdensome" (*see* 49 U.S.C. 30166(m)(4)(D)).

6. NHTSA's ANPRM, however, emphasizes periodic reporting of numerous data streams, incorporates extraterritorial effects, contemplates little, if any, protection of confidential, proprietary, or trade secret data to be disclosed under the tremendously expanded reporting elements, and considers making criminal liability dependent upon "constructive possession."

7. On September 15, 2000, together with the Alliance of Automobile Manufacturers ("Alliance"), VW voluntarily committed to report to the Agency safety recalls and other safety campaigns conducted in a foreign country on a vehicle or component part that is also offered for sale in the United States (*see* letter from Alliance to NHTSA dated September 15, 2000).

8. VW subscribes to the Alliance proposal as outlined in its comments, despite the fact that this proposal requires massive collection and transmission of data located outside the

U.S. The Alliance also has sought to answer difficult ANPRM questions and has defined terms with objectivity and attempted clarity, given the fact that the reporting requirements will implicate penalty and criminal provisions. Vagueness and overbreadth of requirements ought not be a predicate for such extraordinary sanctions.

Extraterritoriality Considerations

9. Based on long-standing and well-recognized international law principles limiting a State's ability to exercise extraterritorial jurisdiction, in particular extraterritorial criminal jurisdiction, the Alliance strongly urges NHTSA to use a reasonableness standard in exercising or attempting to exercise jurisdiction over foreign entities. To this end, VW urges NHTSA to carefully consider the memorandum on extraterritoriality attached to the Alliance letter. Since the 1980's, a number of European and other states have become increasingly assertive in their opposition to U.S. attempts to prescribe rules regarding activities outside the U.S. and increasingly willing to adopt retaliatory statutes designed to blunt the effect of U.S. law. Consultation with the U.S. Trade Representative, U.S. Department of State, and appropriate U.S. government agencies, as well as with major trading partners of the United States (such as Germany and Japan) before regulations are promulgated could help avert potentially serious problems. In fact, when S.3059 (the Motor Vehicle and Motor Vehicle Equipment Defect Notification Improvement Act), the proposed legislation popularly known as the "McCain Bill," was introduced, it included a provision calling for cooperation, international contacts between governments and treaties or international agreements to facilitate cooperation and performance.

The concerns of European authorities regarding extraterritorial aspects of the McCain proposal was manifested in a letter to Senator McCain dated October 6, 2000 by the European Union's Delegation of the European Commission expressing concern that the proposal "will subject European Union manufacturers to extraterritorial burdens not consistent with international law" and "an extraterritorial jurisdiction expansion that is neither necessary for vehicle safety in the U.S. nor conducive to good transatlantic relations." Extraterritorial effects, therefore, are a real-world consideration.

Such concerns should be eliminated or, at least, minimized at the outset. We believe the Alliance proposal strikes the necessary balance between requested early warning elements and extraterritorial concerns.

Further, we believe extraterritoriality concerns attending some of NHTSA's potential actions, as expressed in the ANPRM, raise significant questions about (1) the "reasonableness" of such potential proposals, a potent factor in gauging appropriate legality under international law; (2) conflicts with foreign law or policies; (3) the U.S. case law presumption against extraterritorial application of U.S. statutes; (4) the limits of the "effects doctrine" on maximized extraterritorial reporting of certain data elements; (5) the possibility of proposed requirements failing the balancing tests used to ascertain whether extraterritoriality is appropriate; (6) jurisdictional concerns regarding certain foreign entities; and (7) other concerns involving extraterritorial impacts. The conclusion accurately reached by the authors of the Alliance memorandum is that NHTSA's proposal to reach beyond the U.S. must be guided by principles

of reasonableness, consistency with international law, regulatory restraint, and minimal intrusions upon foreign law and policy.

Confidentiality Considerations

10. NHTSA also must take into account the legitimate needs of companies to maintain confidentiality of materials that amount to trade secrets or other proprietary, valuable business or commercial information with regard to which companies traditionally exert efforts, at great expense, to preserve on a confidential basis. The nature of confidential information and know-how, a valuable property right, is that when it is revealed, the property right is compromised, damaged, or destroyed. We urge NHTSA to exercise caution before regularly collecting massive streams of data periodically, heretofore not reported except upon selective, individual request made in the context of a specific pending matter, and to insert same into the public docket, subject to the relatively scant protections that may be available in litigation under the Freedom of Information Act (FOIA) – assuming that NHTSA even grants confidential treatment in the first place. *See* ANPRM, 66 Fed. Reg. 6543-44. A maximal regime of periodic mass reporting, with knowledge that much confidential and proprietary material inevitably will be disclosed to the public, imposes substantial burdens upon responsible manufacturers. As we show in the ensuing discussion, these are real world problems that have been recognized and addressed by Congress, other agencies of government and the courts and that are the subject of protective federal policies as reflected in federal legislation.

FOIA protections are not an effective answer to the foregoing problems because they are relatively scant and, at least under District of Columbia Circuit law, may involve defining "trade secrets" under antiquated tests so restrictive that much confidential and valuable proprietary data

is nearly always lost or claimed by the plaintiff not to qualify. Modern definitions of "trade secret" in the Uniform Trade Secrets Act (adopted by many states) and the Economic Espionage Act of 1996[1] show that FOIA will not protect much of what the business and legal communities currently consider a trade secret.

Congress gave NHTSA a choice as to requiring the reporting of certain early warning data elements "upon request" or "periodically." If maximized periodic reporting will so compromise property interests by routine release of proprietary information so that constitutionally-protected property rights will be impaired then we respectfully submit that NHTSA must consider a reasonable reporting method that best balances the TREAD Act's safety initiative with the need to preserve confidentiality for legitimate purposes. The Alliance proposal balances generous elements of "periodic" reporting along with elements of "upon request" reporting in a manner that reasonably harmonizes important safety and business interests. NHTSA should take into account as well, that "unduly burdensome" requirements, as proscribed by the TREAD Act (49 U.S.C. 30166(m)(4)(D)), does not only mean the raw volume of paper, chips of data, personnel staffing, translation, and expense burdens involved, but also the real-world economic impact, consequences, and costs of unfettered release of valuable confidential and proprietary information into the docket to be used and misused by opportunists

[1] The Act, at section 104, provides:

"(3) the term 'trade secret' means all forms and types of financial, business, scientific, technical, economic, or engineering information, including patterns, plans, compilations, program devices, formulas, designs, prototypes, methods, techniques, processes, procedures, programs, or codes, whether tangible or intangible, and whether or how stored, compiled, or memorialized physically, electronically, graphically, photographically, or in writing if –

"(A) the owner thereof has taken reasonable measures to keep such information secret; and

"(B) the information derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable through proper means by the public; and

"(4) the term 'owner', with respect to a trade secret, means the person or entity in whom or in which rightful legal or equitable title to, or license in, the trade secret is reposed."

of all stripes. We proceed to briefly elaborate essential considerations supporting our suggestion.

Constitutional Protections of Confidential Data

11. The U.S. Supreme Court has clarified that "confidential information" acquired or compiled by a corporation in the course and conduct of its business "is a species of property to which the corporation has the exclusive right and benefit." Carpenter v. United States, 484 U.S. 19, 26 (1987). Similarly, a trade secret is a property right which is destroyed when made public. Ruckelshaus v. Monsanto Co., 467 U.S. 986 (1984) (litigation involving forced disclosure to the Environmental Protection Agency pursuant to federal statute regulatory pesticide). The "right to exclude others is central to the very definition of the property interest." Id. at 1011. Once the data are disclosed to others, or others are allowed to use those data, the holder of the trade secret no longer has a protectable property interest. Id. Whether the data may still retain some usefulness is irrelevant in determining the economic impact of the disclosure upon the property right. Id. at 1012 (competitive advantage from exclusive access to data is destroyed). Thus, trade secrets and confidential data constitute property rights "protected by the Taking Clause of the Fifth Amendment." Id. at 1004.

The Fifth Amendment's "Taking Clause" (applicable to the states as incorporated by the Due Process Clause of the Fourteenth Amendment) also prohibits the taking of property by the government for private use at any time, or for public use without just compensation or due process. The government need not actually "acquire" the property right; it must only act to deprive the owner of all or most of his interest in the subject matter. Ruckelshaus, 467 U.S. at 1005. In the case of trade secrets or other "confidential" data, it is the forced disclosure of the secret to others that deprives the owner of this unique property right.

The key principles applicable to such an unconstitutional "taking" were discussed in Wearly v. Federal Trade Commission, 462 F.Supp. 589 (D.N.J. 1978), vacated as not ripe, 616 F2d 662 (3d Cir.), cert. denied, 449 U.S. 822 (1980), a lawsuit challenging an administrative subpoena on constitutional grounds. The documents involved "proprietary information" which included not only trade secrets, secret processes, and secret devices but also "a great mass of management data, evaluations, plans, and production results" which had been maintained confidentially within the company. 462 F.Supp. at 593. The owner of the data demanded that "effective means" first be provided to assure the integrity and safety of the information against disclosure.

The federal court held that the proprietary information was a property right whose value would be impaired when the data became public. Id. at 593-94. Constitutional considerations were involved and the court had to be mindful of them. Id. at 597. Where production of the secret data is required by law, disclosure "is justified," said the court, "by strictly limiting dissemination of the information." This "serves the needs of the proceedings and protects the property interest. It amounts to a disclosure under conditions that are themselves privileged." On the other hand, a "[f]ailure to provide adequate protection to assure confidentiality, when disclosure is compelled by the government, amounts to an unconstitutional taking of property by destroying it, or by exposing it to the risk of destruction by public disclosure or by disclosure to competitors." Id. at 598. Compelled disclosures of proprietary information, therefore, require government agencies, including NHTSA, to balance in a quid pro quo fashion, namely, and to use "an arrangement" that "insures against accidental, or unauthorized, or improper disclosure." Id. at 599 (*see also* The Mountain State Telephone & Telegraph Co. v. Dept. of Public Service Regulation, 634 P.2d 181 (Mont. 1981) (order protecting confidentiality of data constitutionally

required as a balancing mechanism); Montana Human Rights Division v. City of Billings, 649 P.2d 1283 (Mont. 1982) (same); In the Matter of the Request for Solid Waste Utility Customer Lists, 524 A.2d 386 (N.J. 1987) (statutory disclosure laws may effect "takings" of confidential information and therefore require "adequate safeguards against public disclosure."); St. Jude Medical, Inc. v. Intemedics. Inc., 107 F.R.D. 398 (D. Minn. 1985) ("taking" argument rejected because the discovery order had left intact "substantial protections" against dissemination of trade secret data); New York Telephone Co. v. Public Service Commission, 56 NY2d 213, 436 NE2d 1281, 451 NYS 2d 679 (N.Y.1982) (due process standards might require adequate protection from public disclosure in rate-making hearings)).

Counterfeiting and Other Damage

12. The VW Group urges NHTSA to be sensitive to the legitimate need of automobile manufacturers to protect design-related information from being accessible to counterfeiters of automotive parts. In 1984, the Senate Committee on the Judiciary lamented the "mushrooming traffic in counterfeit goods and services" and backed special legislation providing criminal penalties and treble damages against offenders.[2] Billions of dollars of counterfeit goods are sold annually. Id. at 4. A defective counterfeit part may "hobble a machine far more valuable than the part itself" and inferior parts may damage the reputation of the trademark owner. Id. The Senate Committee heard "considerable testimony" and saw "substantial evidence" that counterfeiters trafficked in automobile parts, cosmetics, fertilizers, chemicals, perfumes, watches, sporting goods, electronic equipment, computer components, medical devices, and other products. The damage "often" went "far beyond mere economic injury."

[2] Senate Committee on the Judiciary, S.Rep. No. 98-526, at p. 2 (June 21, 1984), leading to enactment of the Trademark Counterfeiting Act of 1984. (18 U.S.C. section 2311-2320).

Many counterfeit products "pose a serious threat to public health and safety." Id. at 4. In 1977, for example, the FAA discovered "shoddily manufactured Boeing fire detection systems potentially affecting up to 100 aircraft"; counterfeit brake parts "caused fatal automobile accidents"; counterfeit heart pumps were sold to more than 200 hospitals; counterfeit drugs "are believed to have killed more than a dozen people." Id., *See* Rakoff & Wolff, Commercial Counterfeiting and the Proposed Trademark Counterfeiting Act, 20 Am. Crim. L. Rev. 145, 149-54 (1982).

The Senate Committee also discussed one case where defendants had manufactured and sold defective helicopter parts falsely bearing the trademark of Bell Helicopter. The defects resulted in several helicopter crashes causing injuries and death. S.Rep. No. 98-526, at 4-5. Legislators noted the difficulty in prosecuting more than a mere fraction of such "clever" trademark counterfeiters who "often operate in networks" and transfer their goods to others for safekeeping. Id. at 6-7.

In 1993 the Federal Trade Commission reported that the auto parts counterfeiting trade amounted to a $3 billion a year business in the U.S. alone, part of $12 billion worldwide enterprise. General Motors, a major target, suggested that its suppliers lose some $1.2 billion annually in lost sales to counterfeit parts. Most copied are wheel covers, disc brake pads and shoes, air conditioning compressors, oil and air filters, shock absorbers, and electronic ignition modules. 200,000 counterfeit automotive blade fuses were seized from one auto parts distributor. Up to 40% of the counterfeits were found defective under SAE and UL standards. 22 Automotive Marketing, No. 11, p. 134 (Nov. 1993).

In other reports counterfeit bolts and other parts were implicated in several deaths. Bogus brake linings made of wood chips contributed to a fatality. Bogus oil filters made in

Taiwan, phony transmission fluid, and counterfeit antifreeze were among items uncovered by a major manufacturer's security group.[3] The threat of eventual disclosure of design specifications, drawings and other technical information to bogus parts makers has been held in products liability litigation to be a bona fide reason for a court's grant of a protective order barring the disclosure and/or dissemination of proprietary information. *See* Farley v. The Cessna Aircraft Co., 1994 U.S. Dist. LEXIS 10205 (E.D. Pa. 1994). Such threats should not be ignored in administrative agency contexts as well.

13. In 1987, Senators heard testimony about damage attributable to the "aftermarket parts" industry involving replacement parts.[4] A representative of Caterpillar, Inc. illustrated how a growing influx of substandard "look-alike parts" confuse the customer and the repair shop as compared to original equipment.[5] The legislators also heard testimony about the use of "nongenuine crash parts which unfortunately are often defective and substandard."[6] A "copy" fender, for example, exhibited rust at 55 hours when subjected to a salt spray while original equipment fenders withstood 300 hours; one fender exhibited 50 alleged deficiencies including a

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[3]The San Francisco Chronicle, Feb. 11, 1991, p. A7. See also EIU Motor Business Asia-Pacific, Feb. 2, 2000 (reports on failing brake shoe linings produced in China); Automotive News International, Oct. 1, 2000, p. 31 (reporting on counterfeit Bosch parts in Russia such as spark plugs and oil filters); Financial Times (London ed.), Oct. 26, 2000, p. 3 (reporting on DaimlerChrysler actions to halt counterfeit Mercedes parts including wheels which had fractured and collapsed); Journal of Commerce, March 17, 2000, p. 6 (Scotland authorities impounded $23 million worth of useless auto parts including brake shoes of compressed grass).

[4]Hearing on S. 791 before the Subcommittee on Patents, Copyrights and Trademarks, Sen. Comm. on Judic., 100th Cong., 1st Sess., at 1-2 (statement of Sen. DeConcini); 3 (same); 7 (Statement of Sen. Hatch). The proposed legislation was intended to protect industrial designs.

[5]Id. at 3941, 47-48 (showing look-alike bulldozer bucket tip and corner adapter which were "cast" and therefore subject to quality defects while Caterpillar*s parts were "forged"; fuel injection nozzles made via different manufacturing process).

[6]Id. at 70-72, 76-80 (statement of Chrysler Motor Corp. Patent Counsel).

split in the metal; another "look-alike" fender had 36 deficiencies; structural integrity of such parts was questioned; examples of poor hood hinge welds were also demonstrated.[7]

More recently, as NHTSA will recall, a GAO report discussed the aftermarket crash parts industry and recycled air bags indicating that at least some investigative studies (including one published by Consumer Reports) had concluded that aftermarket crash parts were of poorer quality, fit improperly, rust more quickly and may compromise safety.[8] In October 1999 judgments totaling over $1 billion were entered against State Farm Insurance for violating Illinois' Consumer Fraud and Deceptive Business Practices Act in using "look-alike" aftermarket crash parts.

The dangers of disclosure of proprietary data are, therefore, just as real for "older" products as they are for current production models. Providing information on engineering or product changes, as envisaged by the ANPRM, would thus not only place manufacturers at a competitive disadvantage (especially considering the resources expended in research and development) but also support the counterfeiters and competitors by permitting them to shorten and streamline their own development process by profiting from free information released by NHTSA.

Although NHTSA may attempt to address confidentiality concerns solely by reference to post-disclosure FOIA exemptions, it is clear that such protection against release of information is

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[7] Id. Representatives of the insurance industry and others, on the other hand, claimed that aftermarket, nongenuine, replacement crash parts were competitive with original equipment parts and were less expensive to the consumer. They, therefore, defended the practice of repairing crashed cars with imitation or nonoriginal equipment parts. See Id. at 92-94; 107-110; 147-151, 163-166.

[8] General Accounting Office, Motor Vehicle Safety: NHTSA's Ability to Detect and Recall Defective Replacement Crash Parts is Limited, at 4-5 (Report to Congress Jan. 31, 2001) (7 studies reach different conclusions; studies limited in number and scope).

limited and subject to the risks and costs of FOIA litigation

Conclusion

14. The Volkswagen Group supports the concepts of early-warning reporting enunciated in the Alliance letter. These concepts offer a practicable and manageable answer to the congressional mandate of establishing an early warning system. Volkswagen encourages NHTSA to consider long-standing international law principles limiting the extraterritorial reach of U.S. laws and to adopt accordingly a "reasonableness" standard when requesting information about occurrences overseas. Volkswagen further encourages NHTSA to protect the public interest and safeguard consumer safety by effectively limiting access to confidential trade secret and proprietary information within the context of a reporting system that reasonably balances the interests. Finally, Volkswagen looks forward to working closely with NHTSA to assure the consuming public of quickly and reliably identifying safety-related defects.

3/23/01